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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

DAVID G. DONOVAN, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, in his official
capacity as President of the United
States of America, *et. al.*,

Defendants.

No. 4:21-cv-05148-TOR

CONTRACTOR DEFENDANTS'
MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED
COMPLAINT PURSUANT TO
FEDERAL RULE OF CIVIL
PROCEDURE 12(b)(6)

3/31/2022

With Oral Argument: 1:30 p.m.
Courtroom 902 Teleconference

CONTRACTOR DEFS.' MOT. TO DISMISS
Case No. 4:21-cv-05148-TOR

4866-1611-7259v.12 0021368-000021

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I. INTRODUCTION AND RELIEF REQUESTED

Defendants Valerie McCain, Scott Sax, Don Hardy, Robert Wilkinson, Hiram Seth Whitmer, Steven Ashby, and John Eschenberg (the “Contractor Defendants”) respectfully request that the Court dismiss the 314 Plaintiffs’ claims against them with prejudice pursuant to Rule 12(b)(6) because those claims are fatally deficient in every conceivable way. This motion should not have been necessary. As this Court previously and correctly noted in its prior order denying Plaintiffs’ request for injunctive relief, Contractor Defendants “are improper defendants for the type of claims raised in this action.” ECF No. 58 at 4:1-4. As the Court further explained in its order (in which the Court also declined to exercise supplemental jurisdiction over Plaintiffs’ state law claims):

Those individuals, named in their official capacities, are private employees of private companies, which did not, and could not, promulgate the challenged Executive Orders. Moreover, those seven private individuals do not employ Plaintiffs; Plaintiffs are employed by private companies, which are not named as defendants. In any event, private employers cannot be liable for constitutional violations.

Id. at 4:4-9; 9:5-11.

Plaintiffs have since filed their First Amended Complaint (“FAC”). However, not only have Plaintiffs declined to dismiss their claims against Contractor Defendants, they have in fact doubled-down by asserting additional meritless claims against these improperly named Defendants, in addition to reasserting state law claims over which this Court already expressly declined to exercise jurisdiction. Hence this motion. Plaintiffs’ baffling pleading decisions aside, their claims against Contractors Defendants should now be dismissed with prejudice—and their counsel

1 sanctioned pursuant to Contractor Defendants’ forthcoming Rule 11 motion—
2 because those claims are utterly without merit.

3 **First**, Plaintiffs’ claims against Contractor Defendants in their “official
4 capacities” fail because, as federal courts routinely recognize, private employees of
5 private companies do not have “official capacities” under which they may be sued.

6 **Second**, Plaintiffs’ direct constitutional claims against Contractor Defendants
7 (i.e., those not asserted through Section 1983) fail because the United States
8 Constitution does not create a private cause of action, and Contractor Defendants are
9 private citizens who cannot be liable for alleged constitutional violations.

10 **Third**, Plaintiffs’ new Section 1983 claims fail because that statute applies
11 only when a private defendant has acted under color of state law, while Plaintiffs
12 frivolously assert Contractor Defendants acted under color of federal law (i.e., the
13 Executive Orders at issue).

14 **Fourth**, to the extent Plaintiffs attempt to assert *Bivens* claims, those claims
15 fail upon multiple, dispositive legal grounds, including that such claims cannot be
16 asserted against a federal contractor and cannot be brought against a private
17 individual in his or her “official” capacity.

18 **Fifth**, Plaintiffs’ Title VII and Americans with Disabilities Act (“ADA”)
19 claims against Contractor Defendants fail because neither statute permits individual
20 liability. Further, only one Plaintiff alleges to have exhausted her administrative
21 remedies with the EEOC, and she admits she received a vaccine exemption and
22 accommodation from her employer.

23 **Sixth**, Plaintiffs’ claims against Contractor Defendants under the federal

1 procurement statutes and the Administrative Procedure Act (“APA”) are defective
2 because these statutes do not provide a cause of action against private citizens.

3 ***Finally***, not only is Plaintiffs’ FAC devoid of specific allegations regarding
4 any acts or omission by Contractor Defendants, Plaintiffs have pleaded themselves
5 out of court. Indeed, the vast majority of Plaintiffs allege they have, in fact, received
6 from their employers exemptions from COVID-19 vaccine requirements.

7 **II. STATEMENT OF FACTS**

8 **Procedural History.** On November 16, 2021, Plaintiffs filed their original
9 Complaint, asserting claims against Contractor Defendants in their capacities as
10 managerial employees of their respective employers (each of which is an entity that
11 contracts with the U.S. Department of Energy (“DOE”)).¹ *See* ECF No. 1 at 3:16-
12 4:15.² Plaintiffs asserted claims for alleged violations of various provisions of the
13 Constitution, the ADA, Title VII, a federal procurement statute, the APA, and an
14 assortment of claims based on Washington state law. *See id.* at 44:15-66:11.

15 On November 19, 2021, Plaintiffs filed their motion for a temporary
16 restraining order and preliminary injunction, ECF No. 11, which the parties argued to
17 this Court on December 17, 2021, ECF No. 57. That same day, the Court entered its
18

19 ¹ For brevity’s sake, this motion will not rehash the gravamen of Plaintiffs’ legal
20 claims (i.e., challenging Executive Orders 14042 and 14043) because the Court is
21 familiar with the record and pleadings. *See generally* ECF No. 58.

22 ² The Contractor Defendants’ respective employers are identified at ECF No. 44 at
23 3:18-23; 4:14-16.

1 order denying Plaintiffs’ motion. ECF No. 58. The order noted that “the present
2 motion and the operative Complaint are riddled with procedural and substantive
3 deficiencies” *Id.* at 3:2-5.

4 Chief among those deficiencies was that Contractor Defendants “are improper
5 defendants for the type of claims raised in this action” because they are “named in
6 their official capacities, are private employees of private companies, which did not,
7 and could not, promulgate the challenged Executive Orders.” *Id.* at 4:1-6. The Court
8 similarly found that Contractor Defendants “do not employ Plaintiffs; Plaintiffs are
9 employed by private companies, which are not named as defendants,” and, “[i]n any
10 event, private employers cannot be liable for constitutional violations.” *Id.* at 4:6-9.
11 In addition to denying Plaintiffs’ request for injunctive relief for numerous
12 substantive reasons—including Plaintiffs’ failure to exhaust their administrative
13 remedies for their Title VII and ADA claims—the Court also “decline[d]
14 supplemental jurisdiction over Plaintiffs’ state law claims.” *Id.* at 9:5-11; 18:16-19:2.

15 Plaintiffs filed their FAC on January 18, 2022. ECF No. 60.³ Despite the
16 Court’s admonition (at both oral argument on the motion for a preliminary injunction
17 and in its order denying the same), Plaintiffs specifically amended their pleading’s
18 caption to assert their claims against each Contractor Defendant in his or her “official
19 _____

20 ³ Three Plaintiffs are identified only by their initials. ECF No. 60 at ¶¶ 59, 76, 158.

21 However, “[T]he identity of the parties in any action . . . should not be concealed
22 except in an unusual case, where there is a need for the cloak of anonymity.” *U.S. v.*
23 *Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1980).

capacity” as managerial employees of their respective employers (which Plaintiffs once again did not name as defendants). *Compare* ECF No. 1 at 1:20-2:9 with ECF No. 60 at 5:5-21. In addition, Plaintiffs also purported to reassert four Washington state law claims—the same claims over which this Court declined to exercise jurisdiction.⁴ Finally, Plaintiffs purported to add 42 U.S.C. § 1983 as a procedural vehicle to assert some, but not all, of their constitutional claims against Contractor Defendants. *See* ECF No. 60 at 80:16-19. The FAC’s claims are summarized below:

Direct Constitutional Claims (i.e., Not Asserted Through Section 1983):

Tenth cause of action: “nondelegation claim” (Article I, Section 1).

Eleventh cause of action: separation of powers (Article I, Section 8).

Twelfth cause of action: violation of the Tenth Amendment.

Thirteenth cause of action: Spending Clause (Article I, Section 8, Clause 1).

Seventeenth cause of action: Commerce Clause (Article I, Section 8, Clause 3). *Id.* at 93:3-99:16; 104:23-106:7.

Constitutional Claims Asserted Through Section 1983:

First cause of action: free exercise of religion (First Amendment).

Second cause of action: equal protection (Fourteenth Amendment).

Seventh cause of action: infringement of privacy rights (presumably Fourteenth Amendment). *Id.* at 80:16-83:19; 87:9-88:3.

⁴ Specifically, under the Washington Law Against Discrimination (fourth cause of action), for breach of contract (fifth cause of action), and intentional or negligent infliction of emotional distress (sixth cause of action). ECF No. 60 at 85:14-86:9. This motion will not address these claims because the Court declined to exercise supplemental jurisdiction over them.

Claims Based upon Federal Statutes:

First cause of action: Religious Freedom Restoration Act (“RFRA”).

Third cause of action: ADA (failure to accommodate).

Fourth cause of action: Title VII (presumably alleged religious discrimination).

Eighth cause of action: Federal Property and Administrative Services Act (40 U.S.C. §§ 101, 121 (“FPASA”)).

Ninth cause of action: “Federal procurement policy” (41 U.S.C. § 1707(a)).

Fourteenth, fifteenth, and sixteenth causes of action: APA (40 U.S.C. § 706).

Eighteenth cause of action: a “freestanding” Section 1983 claim with a passing reference to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). ECF No. 60 at 80:15-19; 83:20-86:2; 88:3-93:2; 99:17-104:22; 106:8-108:11.

Plaintiffs request that the Court, among other things, enter an award of money damages against each Plaintiff’s “specific employer.” *See id.* at 108:25-109:2.

The FAC’s Allegations Regarding Contractor Defendants. On September 9, 2021, President Biden “issued Executive Order 14042 requiring vaccination of all employees of federal contractors.” *Id.* at 75:24-25. Contractor Defendants—each sued in his or her “official” and “professional” capacity—hold management positions with their seven respective employers, which are private entities that contract with DOE. *See id.* at 2:4-21; 9:24-11:24. Plaintiffs allege that on September 15, 2021, each Contractor Defendant “directed the enforcement and implementation of the COVID-19 vaccine mandate” for their respective employer’s employees “under Executive Order 14042.” *Id.* at 9:24-11:24; 76:3-6. There are no specific allegations regarding what action each (or any) Contractor Defendant took to “direct” their respective employers’ “enforcement and implementation” of the vaccine mandate.

1 Plaintiffs further allege:

2 [Contractor Defendants] are properly named Defendants for each's own
3 arbitrary and capricious implementation of Executive Order 14042.
4 Specifically, the arbitrary manner instituted for denying or approving religious
or medical exemptions and accommodations associated with the COVID-19
vaccine mandate.

5 *Id.* at 13:2-7. There are no specific allegations supporting these conclusory
6 assertions. Indeed, Plaintiffs' FAC does not contain a single allegation regarding any
7 action taken by, or communication from, any of the seven Contractor Defendants
8 with regard to any of the Plaintiffs' requests for a religious exemption, medical
9 exemption, or any related accommodations. *See generally* ECF No. 60.

10 Plaintiffs also allege that Contractor Defendants' respective employers "refuse
11 to provide religious or medical accommodations in many cases, and in a few cases
12 where such accommodations are offered, they are transitory in nature and/or subject
13 to withdrawal or unreasonable conditions." *Id.* at 77:9-16. Plaintiffs similarly (and
14 strangely) allege that "***Defendant entities*** have accommodated very few, if any,
15 exemption seeking personnel" and that "[s]ome similarly situated personnel
16 employed by other DOE contractors performing work at the Hanford site are
17 receiving religious and medical exemptions, and reasonable accommodation, to the
18 same vaccination requirement." *Id.* at 77:21-73:5 (emphasis added).

19 Further, Plaintiffs allege—without any specifics—"some Defendants have
20 arbitrarily granted certain Plaintiff accommodation requests while denying similarly
21 situated Plaintiff requests for accommodation." *Id.* at 78:8-11. Plaintiffs do not
22 allege that any federal agency, officer, agent, policy, or directive played any role in
23 the decision-making processes associated with Plaintiffs' requests for religious

1 exemptions, medical exemptions, or associated accommodations. Finally, Plaintiffs
 2 allege “[m]ost or all” of Contractor Defendants’ employers “have paused
 3 enforcement of the COVID-19 vaccine workplace requirement.” *See id.* at 6:17-20.

4 **The FAC’s Allegations Regarding Plaintiffs.** Based upon the FAC’s
 5 allegations, there are 314 Plaintiffs who generally fall within nine overarching groups
 6 (described *infra*) for purposes of Contractor Defendants’ motion to dismiss.⁵
 7 Notably, 29 Plaintiffs do not allege to have any employment relationship with one of
 8 the seven federal contracting entities that also employ a Contractor Defendant.

9 Of the 285 Plaintiffs who do allege such an employment relationship, **230**
 10 Plaintiffs either expressly or implicitly allege they received from their respective
 11 employers the vaccine mandate exemptions and accommodations they requested.
 12 The remaining 55 similarly fail to allege anything remotely resembling a colorable
 13 claim against Contractor Defendants, many for bizarre reasons, as described below.

14 ***Plaintiffs Who Allege They Are DOE Employees.*** Eight Plaintiffs allege that
 15 they are DOE employees (as opposed to an employee of one of the entities that also
 16 employs a Contractor Defendant). *See id.* at ¶¶ 33; 78; 93; 115; 139; 193; 318; 337.

17 ***Plaintiffs Who Allege To Be Employees of Miscellaneous Entities.***
 18 Strangely, 11 Plaintiffs allege to be employed by entities that do not employ any of
 19 the Contractor Defendants and that are not otherwise mentioned in the FAC. *See id.*
 20 at ¶¶ 62; 103; 110; 181; 192; 222; 232; 233; 236; 241; 322.

21 ***Plaintiffs Who Do Not Identify Their Employers.*** 10 Plaintiffs do not even
 22

23 ⁵ FAC paragraphs 50, 57, 142, and 146 each identify more than one Plaintiff.

1 identify their employers. *See id.* at ¶¶ 40; 48; 84; 92; 158; 171; 270; 317; 326; 336.

2 ***Federal Contractor Plaintiffs Who Specifically Allege They Were***

3 ***Accommodated.*** 54 of the Plaintiffs who do claim to work for an entity that employs
4 a Contractor Defendant specifically allege their respective federal contractor
5 employers accepted their requests for religious or medical exemption and have
6 provided them with related accommodations, which they accepted. *See id.* at ¶¶ 34-
7 36; 44; 47; 50; 51; 53; 55; 57; 60; 61; 64; 71; 75; 81; 85; 100; 106; 127; 129; 134;
8 138; 146; 146; 152; 155; 172-174; 182; 188; 196; 198; 206; 214; 216; 231; 234; 239;
9 240; 251; 276; 280; 281; 284; 300; 313-316; 323; 324; 334.

10 ***Federal Contractor Plaintiffs Who Allege They Were “Originally Not”***

11 ***Accommodated.*** Numerous Plaintiffs alleged in their original Complaint that he or
12 she “has been provided no accommodation.” *See* ECF No. 1 at 4:19-41:14.
13 However, Plaintiffs’ FAC now alleges that 176 of these Plaintiffs were “*originally*
14 not provided an accommodation.” Plaintiffs provide no explanation for this curious
15 word choice. The only reasonable inference that can be drawn is that these Plaintiffs’
16 respective employers have since provided accommodations for these Plaintiffs’
17 exemption requests. *See id.* at ¶¶ 41-43; 46; 49; 50; 52; 54; 59; 63; 68-70; 72-74; 76;
18 80; 83; 88; 89; 91; 94; 96-99; 101; 102; 104; 105; 107; 109; 114; 117-120; 122-124;
19 128; 130; 131; 133; 135-137; 140; 141; 143-146; 148-151; 153; 154; 156; 157; 159;
20 160; 162-170; 175-180; 186; 187; 189-191; 194; 197; 199-202; 204; 205; 207-213;
21 215; 217; 218; 220; 223; 224; 226-230; 237; 242-247; 249; 250; 252-256; 258-262;
22 264; 265; 267-269; 271-275; 277-279; 282; 283; 285; 286; 288; 289; 291-298; 301;
23 302; 304-309; 319; 321; 325; 327-331; 333; 335; 338; 339.

1 ***Federal Contractor Plaintiffs Who Allege They Were Already Vaccinated.***

2 Seven Plaintiffs who claim to work for an entity that also employs a Contractor
3 Defendant allege that they have already received the COVID-19 vaccine. *See id.* at
4 ¶¶ 82; 116; 126; 142; 184; 266; 312.

5 ***Federal Contractor Plaintiffs Who Allege They Have Not Submitted an***
6 ***Exemption Request.*** Puzzlingly, three Plaintiffs affirmatively allege that they have
7 “*not* submitted an exemption request” to their respective federal contractor
8 employers. *See id.* at ¶¶ 58; 185, 235. Similarly, two Plaintiffs fail to allege they
9 submitted an exemption request and do not identify any potential basis for such a
10 request. *See id.* at ¶¶ 113; 221.

11 ***Federal Contractor Plaintiffs Who Do Not Make Any Substantive***
12 ***Allegations.*** 12 Plaintiffs allege only that they are employed by an entity that also
13 employs one of the Contractor Defendants. *See id.* at ¶¶ 45; 108; 121; 132; 147; 161;
14 195; 203; 225; 238; 287; 290.

15 ***Federal Contractor Plaintiffs Who Allege They Requested Exemptions But***
16 ***Were Not Provided Accommodations.*** Out of the 230 Plaintiffs who allege to work
17 for one of the entities that also employ a Contractor Defendant, only 31 actually
18 allege they were not provided accommodations associated with their request to their
19 employers for medical and/or religious exemptions. *See id.* at ¶¶ 31, 32, 37, 38, 39,
20 40, 50, 56, 57, 65, 66, 67, 77, 79, 87, 95, 111, 112, 125, 142, 248, 257, 263, 299, 320,

1 332, 337. Of these Plaintiffs, *none* allege to have exhausted the EEOC's
 2 administrative process.⁶

3 **III. ARGUMENT AND AUTHORITY**

4 **A. Plaintiffs' "Official Capacity" Claims Are Frivolous.**

5 The Court previously admonished Plaintiffs that Contractor Defendants,
 6 "named in their official capacities," are "are improper defendants for the type of
 7 claims raised in this action" and were "subject to dismissal." ECF No. 58 at 4:1-1.
 8 Rather than listen to the Court's admonition, Plaintiffs did the opposite and filed an
 9 amended complaint that more clearly states that they are, in fact, suing Contractor
 10 Defendants in their "official capacities." ECF No. 60 at 5:5-21. Plaintiffs defied the
 11 Court at their peril, as federal courts do not recognize the concept of "official
 12 capacity" claims against the employees of private companies:

13 [I]t is not necessary to allow plaintiff to pursue his claims against the Individual
 14 Defendants in their 'official' capacities. Official capacity lawsuits are
 15 appropriate in cases involving the naming of government officials. Where, as
 here, there is a private entity to name, there is no reason to allow a plaintiff to
 proceed against an individual in his "official capacity."

16 *Coddington v. Adelphi Univ.*, 45 F. Supp. 2d 211, 217-18 (E.D.N.Y. 1999)
 17 (dismissing related ADA claims); *accord Ellibee v. Leonard*, 226 Fed. Appx. 351,
 18 357 (5th Cir. 2007) ("the defendants had no official capacities in which they could
 19 be sued"); *Beck v. FedEx Ground*, 2007 WL 2028581, at *2 (E.D. Cal. July 10, 2007)

21 ⁶ Only one Plaintiff—Pamela Hartsock—alleges to have received an EEOC "Right to
 22 Sue" letter after her request for a "religious exemption" on unspecified grounds was
 23 "*originally* not provided." ECF No. 60 at ¶ 145 (emphasis added).

1 (“The concept of ‘official and/or agency capacity’ makes no sense whatsoever in the
2 context of this case [because it] is inapplicable to suits against private parties.”).

3 Indeed, federal courts routinely dismiss claims asserted against the employees
4 of private companies on this basis alone. *See, e.g., DeRay v. Larson*, 283 F. Supp. 2d
5 706, 709-10 (D. Conn. 2003) (“it is unnecessary to allow a claim against a defendant
6 in his or her official capacity when the entity of which he is an official is capable of
7 being sued directly”); *Brown v. Perry*, 2021 WL 1160964, at *1 n.1 (S.D. Miss. Mar.
8 25, 2021) (“Paige is a private business employee so he cannot be sued in an ‘official
9 capacity’”); *Wishnefsky v. Salameh*, 2016 WL 11480717, at *2 (W.D. Pa. Nov. 18,
10 2016), *report and recommendation adopted*, 2016 WL 7324080 (W.D. Pa. Dec. 16,
11 2016) (dismissing claims against defendant because he “is not an employee of the . . .
12 the state, and therefore he does not have an ‘official’ capacity”).

13 **B. Plaintiffs’ “Direct” Constitutional Claims Are Frivolous.**

14 Plaintiffs’ direct constitutional claims against Contractor Defendants (i.e.,
15 those asserted without reference to Section 1983) are frivolous because there is “no
16 cause of action directly under the United States Constitution.” *Azul-Pacifico, Inc. v.*
17 *City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992). “Even if an independent
18 cause of action did exist under the . . . Constitution, no action would lie against these
19 defendants [because they are] private individual[s].” *Pavalone v. Pres. Mgmt. Inc.*,
20 2019 WL 1117931, at *5 (M.D. Pa. Jan. 8, 2019), *report and recommendation*
21 *adopted*, 2019 WL 1117919 (M.D. Pa. Mar. 11, 2019) (ruling the claims frivolous).

22 **C. Plaintiffs’ Section 1983 Claims Are Frivolous.**

23 Plaintiffs’ “standalone” Section 1983 claim fails outright because “[Section]

1 1983 ‘is not itself a source of substantive rights,’ but merely provides a method for
 2 vindicating federal rights elsewhere conferred.’” *Graham v. Connor*, 490 U.S. 386,
 3 393-94 (1989); *accord Beveridge v. City of Spokane*, 2021 WL 3082003, at *1 (9th
 4 Cir. July 21, 2021) (affirming dismissal of “standalone § 1983 claim”).

5 Plaintiffs’ attempt to assert constitutional claims through Section 1983 is also
 6 meritless because Plaintiffs contend Contractor Defendants were acting under color
 7 of *federal* law, not state law. As countless federal courts have explained, “[T]o state
 8 a claim under § 1983, a plaintiff must plausibly allege that ‘she suffered the
 9 deprivation of a federally protected right and that the alleged deprivation was
 10 committed by a person acting under color of *state* law.’” *Sampson v. Cty. of L.A.*,
 11 974 F.3d 1012, 1018 (9th Cir. 2020) (emphasis added). “[S]tate action may be
 12 found if, though only if, there is such a close nexus between *the State* and the
 13 challenged action that seemingly private behavior ‘may be fairly treated as that of
 14 the State itself.’” *Villegas v. Gilroy Garlic Festival Ass’n*, 541 F.3d 950, 955 (9th
 15 Cir. 2008) (emphasis added).

16 Plaintiffs do not allege—and have never claimed—that there is *any* nexus
 17 between their employers’ implementation of Executive Order 14042 and the State of
 18 Washington, any of its agencies, or any of its officials. Therefore, their Section 1983
 19 claims fail as a matter of law. *See Riggio v. Bank of Am. Nat’l Tr. & Sav. Ass’n*, 31
 20 Fed. Appx. 505, 506 (9th Cir. 2002) (affirming dismissal because “[plaintiff’s]
 21 complaint alleges, at most, that defendants acted under color of federal law.”).⁷

22
 23 ⁷ Plaintiffs’ Fourteenth Amendment claims fails for the same reason. *See San*

D. To the Extent Plaintiffs Assert *Bivens* Claims, They Are Both Legally Meritless And Insufficiently Plead.

It is unclear whether Plaintiffs are asserting *Bivens* claims against Contractor Defendants. *See* ECF No. 60 at 106:8-108:11. To the extent Plaintiffs purport to do so, they fall woefully short of sufficiently alleging a *Bivens* claim against any Contractor Defendant, much less all seven of them.

In order to sustain a cause of action under *Bivens*, a plaintiff must allege facts showing that: (1) a right secured by the Constitution or laws of the United States was violated; and (2) the alleged deprivation was committed by a federal actor. *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991); *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

With regard to the first element, Contractor Defendants assume Plaintiffs contend the COVID-19 vaccine somehow conflicted with their requests for “religious exemptions” from their respective employers. Those bare allegations fall far short of plausibly alleging an actionable free exercise claim:

A religious claim, to merit protection under the free exercise clause of the First Amendment, must satisfy two basic criteria. First, the claimant’s proffered belief must be sincerely held; the First Amendment does not extend to ‘so-called religions which ... are obviously shams and absurdities and whose members are patently devoid of religious sincerity.’ Second, . . . the claim must be rooted in religious belief, not in ‘purely secular’ philosophical concerns.’

Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 543 n.21 (1987) (“The Fourteenth Amendment applies to actions by a State. The claimed association in this case is between the USOC and the Federal Government. Therefore, the Fourteenth Amendment does not apply.”).

1 *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981).

2 Here, no Plaintiff has submitted any allegations whatsoever regarding his or
3 her religious beliefs or their sincerity. *See Reed v. Great Lakes Companies, Inc.*, 330
4 F.3d 931, 934 (7th Cir. 2003) (plaintiff who did not identify his religion “utterly
5 failed to make a prima facie case of intentional religious discrimination”). As a
6 result, there is nothing separating any such supposed religious beliefs about the
7 vaccine from “purely secular” concerns. Indeed, as the Third Circuit noted,
8 opposition to vaccination requirements can be, but is not necessarily, religious in
9 nature, citing the example of Christian Scientists. *See Fallon v. Mercy Catholic Med.*
10 *Ctr. of Se. Pennsylvania*, 877 F.3d 487, 492 (3d Cir. 2017) (holding plaintiff’s belief
11 “that the flu vaccine may do more harm than good—is a medical belief, not a
12 religious one”).

13 With regard to the second *Bivens* element, Plaintiffs fail to allege that any
14 Contractor Defendant, much less all seven, were personally involved with any
15 supposed deprivation of any Plaintiff’s constitutional rights. *See Ashcroft v. Iqbal*,
16 556 U.S. 662, 676 (2009) (“a plaintiff must plead that each Government-official
17 defendant, through the official’s own individual actions, has violated the
18 Constitution”). Even if Plaintiffs had plausibly alleged that Contractor Defendants
19 were personally involved with a supposed deprivation of their constitutional rights,
20 their abject failure to “show that the actions complained of are ‘fairly attributable’ to
21 the [federal] government” would nonetheless doom any purported *Bivens* claim.
22 *Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1340 (9th Cir. 1997).

23 Federal courts analyze four factors to determine whether an entity is engaging

1 in government action: 1) the degree of funding by the government; 2) the extent to
2 which regulations influence the entity's conduct; 3) whether the entity was engaging
3 in a public function; and 4) whether there was a symbiotic relationship between the
4 government and the entity. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-43 (1982). In
5 applying these factors, court musts "start with the presumption that conduct by
6 private actors is not state action." *Florer v. Congregation Pidyon Shevuyim, N.A.*,
7 639 F.3d 916, 922 (9th Cir. 2011).

8 Plaintiffs have not alleged any facts that would establish any of these four
9 factors with respect to any Contractor Defendants.⁸ For example, Plaintiffs allege in
10 conclusory fashion that "the Defendant Employers' enforcement activities regarding
11 the Executive Orders rendered the action of Defendant Employers to be government
12 action." ECF No. 60 at 80:11-14. Yet the only specific allegations Plaintiffs
13 provide as support are: (1) "DOE's Head of Contracting Activity for the Office of
14 Environmental Management, Angela Whatmore (sic)" issued a "Memorandum" on
15 September 30, 2021, that, according to Plaintiffs, "monetarily incentivized DOE
16 contractors to vaccinate their workforce as much as possible"; and (2) "The
17 Defendant Employers have, in all material respects, adopted these government-
18 imposed requirements in regard to their workforces, including the Plaintiffs." *See id.*
19 at 79:12-80:10.

20 These sparse contentions, however, fail to establish "government action" by
21

22 ⁸ Plaintiffs' RFRA claims fail for the same reason. *Sutton*, 192 F.3d at 833-34
23 (RFRA claim requires showing private employer acted "under color of law").

Contractor Defendants (or their employers) as a matter of law because “governmental funding and extensive regulation without more will not suffice to establish governmental involvement in the actions of a private entity.” *Morse*, 118 F.3d at 1341; accord *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 817 (9th Cir. 2010) (“The Supreme Court, as well as case law in this and our sister circuits, permits the state to ‘subsidize[] the operating and capital costs’ of a private entity without converting its acts into those of the state.”).

Moreover, *Bivens* claims may not be brought against private entities that contract with the federal government because “the threat of suit against an individual’s employer was not the kind of deterrence contemplated by *Bivens*.” *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001). Plaintiffs cannot circumvent this categorical limitation by purporting to name employees of private employers in their “official capacities.” See, e.g., *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987) (“[A] *Bivens* action can be maintained against a defendant in his or her individual capacity only, and not in his or her official capacity.”); *Ramiscal v. Bureau of Prisons*, 2015 WL 4207923, at *5 (C.D. Cal. June 1, 2015), *report and recommendation adopted*, 2015 WL 4208195 (C.D. Cal. July 10, 2015) (“because plaintiff may not bring a *Bivens* claim against a private corporation operating under a federal contract, he may not bring a *Bivens* claim against Dr. Manolescu in his official capacity”).⁹

⁹ Even if Plaintiffs had adequately alleged a free exercise claim, “*Bivens* comes accompanied with a qualified-immunity defense” that is nevertheless fatal to their

E. Plaintiffs' Title VII and ADA Claims Are Frivolous.

This Court previously and correctly held that Contractor Defendants “do not employ Plaintiffs; Plaintiffs are employed by private companies, which are not named as defendants.” ECF No. 58 at 4:6-8. Nevertheless, Plaintiffs’ FAC once again asserts Plaintiffs’ Title VII and ADA claims against Contractor Defendants instead of Plaintiffs’ actual employers. Plaintiffs ignored the Court at their peril because Contractor Defendants cannot be liable under either statute as a matter of law. *See Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (Title VII does not “impose individual liability on employees”); *Greenlaw v. Garrett*, 59 F.3d 994, 1001 (9th Cir. 1995) (ADA does not impose individual liability on employees).

To the extent Plaintiffs believe that their purporting to assert claims against Contractor Defendants in their “official capacities” somehow circumvents this insuperable barrier, they are mistaken. *See Beck*, 2007 WL 2028581, at *3 (“Plaintiff does not dispute the clear Ninth Circuit law, but again merely argues that the claim is valid because Williams is solely being sued in her ‘official capacity.’ As discussed previously, the court finds this argument unpersuasive.”) (citing *Walsh v. Nevada Dep’t of Human Resources*, 471 F.3d 1033 (9th Cir.2006); *Coddington*, _____ claims against Contractor Defendants. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1883 (2017). Plaintiffs have not alleged, and cannot demonstrate, that there existed at the time of the “challenged conduct” a “clearly established” right on Plaintiffs’ part to be exempted from Executive Order 14042’s vaccine mandate requirements. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 741 (2011).

1 45 F.Supp.2d at 217)).

2 The Court also previously held that “Plaintiffs’ claims cannot proceed in district
3 court because they have failed to exhaust their administrative remedies.” ECF No. 58
4 at 18:17-19. Plaintiffs nevertheless filed their FAC, in which only one of the 314
5 Plaintiffs alleges to have exhausted her EEOC remedies (although she also alleges she
6 was granted the accommodations she requested). Therefore, all 314 Plaintiffs’ ADA
7 and Title VII claims fail as a matter of law (and raise issues related to Rule 11).

8 **F. Plaintiffs’ Federal Procurement and APA Claims Are Frivolous.**

9 Plaintiffs’ claims against Contractor Defendants under the FPASA, the
10 “Federal Procurement Policy,” and APA are fatally defective because none of these
11 statutes provides a private cause of action against private citizens. *See* 41 U.S.C. §
12 101, *et seq.*; 41 U.S.C. § 1707(a); 5 U.S.C. § 551, *et. seq.*; *see also Shell Gulf of*
13 *Mexico Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 636 (9th Cir. 2014)
14 (“A claim under the APA cannot be asserted against a private party.”); *Northrop*
15 *Univ. v. Harper*, 580 F. Supp. 959, 963 (C.D. Cal. 1983) (Procurement Act “does not
16 provide for such private enforcement actions”). Irrespective of that fatal legal defect,
17 the purported Plaintiffs have not and cannot not allege that Contractor Defendants
18 undertook any actions that could in any way implicate these statutory regimes, the
19 first of which relates exclusively to federal procurement contracts, and the second
20 and third of which relate only to federal administrative agencies.

21 **G. Plaintiffs Have Pleaded Themselves Out of Court.**

22 Aside from the numerous fatal legal defects addressed *supra*, each Plaintiff has
23 pleaded himself or herself out of court. *See* Section II, “The FAC’s Allegations

1 Regarding Plaintiffs.” *Cline v. Indus. Maint. Eng’g & Contracting Co.*, 200 F.3d
2 1223, 1232 (9th Cir. 2000) (“[I]f a plaintiff does plead particulars, and they show that
3 he had no claim, then he is out of luck—he has pleaded himself out of court.”).

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court should dismiss Plaintiffs’ FAC in its
6 entirety and with prejudice for failure to state a claim upon which relief may be granted.
7 *See, e.g., Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (“An
8 amendment is futile when ‘no set of facts can be proved under the amendment to the
9 pleadings that would constitute a valid and sufficient claim or defense.’”).

1 DATED this 1st day of February, 2022.

2
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to those who have appeared in this action.

DATED this 1st day of February 2022.

s/ Mark N. Bartlett

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